Supreme Court, U. S.
FILED
APR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No .....

79-1693

TERRY TUCK, INC.

Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Respondent.

Petition of Terry Tuck, Inc. for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

SLAFF, MOSK & RUDMAN,
GEORGE SLAFF,
MARC R. STEIN,
9200 Sunset Boulevard,
Suite 825,
Los Angeles, Calif. 90069,
(213) 275-5351,
Attorneys for Petitioner,
Terry Tuck, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	3
Argument	5
The Judgment of the Court Below Was Contrary to the Decisions of This Court	5
The Historical Background of the "Conclusive Presumption" Rule	8
This Court Has Held That the Policy of the Act Is Not Contravened by Permitting the Shipper to Offset His Damage From a Carrier's Wrong Against the Carrier's Claim for Its Charge	12
Conclusion	17
Appendix A. Memorandum and Order Re: Finding of Fact, Conclusion of Law, Granting Partial Summary Judgment, Dismissing Counter-Claim, Dismissing Claim for Punitive Damages, and Dismissing Action	App. p. 1
Appendix B. Opinion	6

TABLE OF AUTHORITIES CITED

Cases — Page

Aero Trucking Inc. v. Royal Tube Company, 594 F.2d 619 (7th Cir. 1979) 4

Armour Packing Company v. United States, 209 U.S. 55 (1908) 9

Atchison T. & S.F. R. Co. v. Robinson, 233 U.S. 173 (1914) 5, 6

Burkhart v. Fort Worth & D.C. Ry. Co., 149 F.2d 909 (8th Cir. 1945) 4

Chicago & N.W. Rwy. v. Lindell, 281 U.S. 14 (1930) 12, 13, 14, 15

Forster Bros. Co. v. Duluth S.S.&A.R. Co., 14 Inters. Com. Rep. 232 (1908) 11

Francis v. Southern Pacific Co., 333 U.S. 445 (1948) 15, 16

George N. Pierce Co. v. Wells Fargo & Co., 236 U.S. 278 (1915) 12, 13

Great Northern R. Co. v. O'Connor, 232 U.S. 508 (1914) 5, 6

Kansas City Southern Rwy. Co. v. Carl, 227 U.S. 639 (1913) 5, 6, 7, 11

Louisville & N.R. Co. v. Maxwell, 237 U.S. 94 (1915) 11

New York Central and Hudson River Railroad Company v. United States, 212 U.S. 481 (1909) 9

New York, New Haven and Hartford R.R. Co. v. Interstate Commerce Commission, 200 U.S. 361 (1906) 9

Pettibone v. Richardson, 126 F.2d 969 (7th Cir. 1942) 4

Poor v. Chicago B. & Q. R. Co., 12 Inters. Com. Rep. 418 (1907) 11

Southern Pacific Company v. Miller Abattoir Company, 454 F.2d 357 (3rd Cir. 1972) 14, 15

Page

Standard Oil Co. of Indiana v. United States, 164 F. 376 (7th Cir. 1908) 9

Texas & Pacific Rwy. Co. v. Mugg & Dryden, 202 U.S. 242 (1906) 10

Trammel v. United States, 48 U.S.L.W. (Feb. 27, 1980) pp. 4201, 4203 .....15, 16

United States v. New York Central and Hudson River Railroad, 212 U.S. 509 (1909) 9

Miscellaneous

First Annual Report of the Interstate Commerce Commission (1887) pp. 5-7 9

Report, Senate Select Committee on Interstate Commerce, 49th Cong., 1st Sess. (1886) pp. 191, 198, 199 9

Rules

Rules of United States Supreme Court, Rule 19 7

Statutes

United States Code, Title 28, Sec. 1254(2) 2

United States Code, Title 49, Sec. 317(b)..... 2, 3

United States Code Annotated, Title 49, Sec. 41..... 13

United States Code Annotated, Title 49, Sec. 41(2) .. 10

Textbooks

Drinker, Henry S., "The Interstate Commerce Act," (George T. Bisel Co., 1909) p. 55 9

Hadley, A.T., "Railroad Transportation," (G. P. Putnam's Sons, 1885, 1889 Ed.) p. 21 9

Hillman, J.J., "Competition and Railroad Price Discrimination," (The Transportation Center of Northwestern University, 1967) p. 148 16

The Nature of the Judicial Process, in Selected Writing of Benjamin Nathan Cardozo (Hall Ed. 1947) p. 174 . 16

IN THE

Supreme Court of the United States

October Term, 1979
No. .....

TERRY TUCK, INC.

Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Respondent.

Petition of Terry Tuck, Inc. for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

Terry Tuck, Inc. ("Terry Tuck") petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit, entered in this case on January 29, 1980.

Opinion Below.

The opinions of the District Court for the Central District of California and of the Court of Appeals for the Ninth Circuit are set out in Appendix A and Appendix B, respectively. The opinion of the Court of Appeals is reported in 612 F.2d 465.

The judgment of the District Court was entered on November 7, 1975.

The judgment of the Court of Appeals was entered on January 29, 1980.

Jurisdiction.

The jurisdiction of the Court is invoked pursuant to Title 28 U.S.C. §1254(1).

Question Presented.

The question presented for review may be stated as follows:

> When a shipper has paid a common carrier the rate prescribed in the carrier's tariffs, is the shipper precluded from suing the carrier for *fraudulent* rate misrepresentation, made by the carrier in order to keep the shipper from utilizing a competing carrier at a great saving in cost to the shipper?

Statute Involved.

The only statute involved is Title 49 U.S.C. §317 (b) which provides:

> "No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transporation in interstate or foreign commerce except such as are specified in its tariffs: *Provided*, That the provisions of sections 1(7) and

> 22 of this title shall apply to common carriers by motor vehicles subject to this chapter."

Petitioner does not challenge the validity of the statute. Petitioner does challenge the engrafting upon the statute by the Circuit Court[1] *in a fraud case* of a *conclusive presumption* that the shipper knew the carrier's tariffs and accordingly, the carrier was free to perpetrate a wilful fraud upon the shipper with regard to the rate.

Statement of the Case.

The facts of the case are simple and straightforward.

Respondent (hereafter "Consolidated") sued Petitioner (hereafter "Terry Tuck") for the balance due ($12,531.36) on a number of shipments from the East Coast to Terry Tuck's plant in Los Angeles.

Summary judgment for that amount was granted against Terry Tuck; was not appealed from; and indeed, was paid in full. However, Terry Tuck had counterclaimed for damages in the amount of $10,000 (and for punitive damages) based on Consolidated's fraud. Terry Tuck alleged that upon examination of early billings from Consolidated, it found that a competing carrier (Western Carloading) by reason of being a freight forwarder could carry its goods at a much lower rate and indeed offered to do so. (R. 186.) On being so advised, a Consolidated agent came to Terry Tuck's office and, in order to keep Terry Tuck from switching its business to Western Carloading, advised Terry Tuck it was being incorrectly billed and that it need only pay Consolidated a lower rate than the billed rate. (R. 177-178.) On the basis of these representations, Terry Tuck did not switch

---

[1]We do not hesitate to point out to the Court at the outset that there is no conflict among the Circuits in this regard. Indeed, as appears in the *per curiam* opinion of the Ninth Circuit, that Circuit relied exclusively upon decisions of the Seventh and Eighth Circuits.

its business to Western Carloading, (R. 178), but continued to ship via Consolidated and to pay Consolidated the lower rate. By not giving its business to Western and subsequently being required to pay Consolidated the difference ($12,-531.36) between what it had paid Consolidated and the one of Consolidated's thousands of filed rates which was, despite its employee's representation to the contrary, actually applicable, Terry Tuck was damaged in the amount of $10,000. (R. 8.)

However, on Consolidated's motion the District Court dismissed Terry Tuck's counterclaim in reliance upon *Pettibone v. Richardson*, 126 F.2d 969 (7th Cir. 1942), and the Circuit Court in reliance on *Pettibone, supra, Burkhart v. Fort Worth & D.C. Ry. Co.*, 149 F.2d 909 (8th Cir. 1945) and *Aero Trucking Inc. v. Royal Tube Company*, 594 F.2d 619 (7th Cir. 1979), affirmed *per curiam*.

ARGUMENT.

The Judgment of the Court Below Was Contrary to the Decisions of This Court.

The dismissal of Terry Tuck's counterclaim for fraud rests entirely upon the "conclusive presumption" that a shipper knows every one of the carrier's thousands of filed rates as well as he/she/it knows that the sun rises in the East and therefore cannot be led astray by the *fraud* of the carrier. In reaching this conclusion the Court below, like the two circuits on whose decisions it relied, ignored completely the clear statements *of this Court* that the "conclusive presumption" first declared by this Court in *Kansas City Southern Rwy. Co. v. Carl*, 227 U.S. 639 (1913) did not apply in the case of the carrier's fraud. *Great Northern R. Co. v. O'Connor*, 232 U.S. 508 (1914); *Atchison T. & S.F. R. Co. v. Robinson*, 233 U.S. 173 (1914); *George N. Pierce Co. v. Wells Fargo & Co.*, 236 U.S. 278 (1915).

Those three cases were decided almost immediately following the *Carl* case. In *Carl*, a shipper, "in order to obtain the lower of two freight rates"[2] had shipped goods at an agreed value less than their actual value, and upon their loss, sued for the full value. For the first time in any civil case under the Interstate Commerce Act, the words "conclusively presumed" appeared in a decision of this Court, but only after this Court had been careful to note that "There was no evidence tending to show any misrepresentation made by the [railroad] company, or any deceit, or fraud . . ."[3] There this Court said:

> "When there are two published rates, based upon difference in value, the legal rate automatically attaches

---

[2] 227 U.S. 639, 640.
[3] *Id.*

itself to the declared or agreed value . . . The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods . . . until the full legal rate has been paid.''[4]

But within a very short time after *Carl*, this Court took pains to point out, in three separate cases, that this presumption was not to be applied in the case of fraud by the carrier. The first of those cases was *Great Northern Railway Company v. O'Connor*, 232 U.S. 508 (1914), decided less than a year after *Carl*. Like *Carl* that was a case in which the shipper had shipped goods at a rate which provided for a lower valuation than the goods' actual value and, when the goods were lost, sought to recover their actual value. In denying recovery of an amount over the lower valuation, this Court said:

''If . . . there are alternative rates based on value, and the shipper names a value to secure the lower rate, the carrier, *in the absence of something to show rebating or false billing* is entitled to collect the rate which applies to goods of that class . . .''[5] [Emphasis supplied.]

Six weeks later, in *Atchison, T.& S.F.R. Co. v. Robinson*, 233 U.S. 173, 180 (1914), this Court reiterated that ''so long as they [the filed tariff rates] are operative, they are conclusive as to the rights of the parties, *in the absence of facts or circumstances showing an attempt at rebating or false billing. Great Northern R. Co. v. O'Connor, supra.*'' [Emphasis supplied.]

Finally, a year later this Court made it abundantly clear that those two cases vitiated the application of the ''con-

---

[4]227 U.S. 639, 652-653.
[5]232 U.S. 508, 515.

clusive presumption'' where the carrier's fraud was involved. In *George N. Pierce Company v. Wells Fargo & Company*, 236 U.S. 278, 286 (1915) this Court took the occasion to point out that, while there was no element of fraud in the case before it, nevertheless,

''In the O'Connor Case, 232 U.S. 503 and the Robinson Case, 233 U.S. 173, above, the doctrine of the conclusiveness of the filed rates was said to have no application to *fraudulent acts* or false billings.'' [Emphasis supplied.]

These deliberate statements by this Court underscore its determination from the outset not to permit the ''conclusive presumption'' rule of *Carl* to be misapplied to cases involving a carrier's ''fraudulent acts'' in connection with its rates. Nevertheless, the Court below, following the lead of the Seventh and Eighth circuits, completely disregarded what this Court pointed out in those three cases and applied what this Court had said in *Carl*, where no fraud by the carrier was involved, to a case of wilful fraud perpetrated by a carrier upon a shipper strictly for the carrier's monetary benefit.

This case has certainly been decided by the Court of Appeals for the Ninth Circuit ''in a way to conflict with *applicable decisions* of this court'' and that Court ''has decided an important question of federal law which has not been but should be, *settled* by this court.'' [Emphasis added.] Rule 19, Rules of Supreme Court.

It may be reasonably (if not ''conclusively'') presumed that unless this Court reverses the Court below, other circuits will join the parade which holds that carriers may continue with impunity to defraud shippers by deliberate misrepresentations of rates and will thus agree with the statement by Consolidated's corporate counsel in his letter to Terry Tuck that ''the truth'' of whether or not Consolidated's

agent perpetrated a fraud upon Terry Tuck is not "the relevant question." (R. 180-181.)

If fraud—on the part of common carriers—is to be permanently enshrined in the pantheon of greed, certiorari should be denied.

If, on the other hand, this Court looks to the rationale of the rule in cases *not* involving the carrier's fraud and to its own statements that such presumption *was not to be invoked* to protect a carrier's fraud, and refuses to be taken in by the horribles usually paraded by the self-interested carrier about "rebates under the guise of" such suits, then certiorari should be granted.

While the particularly invidious application of this lower court-made rule immunizing fraud by a carrier—and it is only to this that we address ourselves—has never been specifically before this Court, this Court has, as we have pointed out, clearly indicated its disapproval of the rule's applicability in the case of "fraudulent acts" involving rates by the carrier. We submit that this Court should take this opportunity to strike down a rule enunciated by three circuits which condones fraudulent conduct by a carrier and which cannot be justified today on any ground of business necessity, let alone business morality, and which flies in the face of what this Court has said.

The Historical Background of the "Conclusive Presumption" Rule.

Obviously, we do not close our eyes to the line of cases which, after the passage of the Interstate Commerce Act in 1887, grafted on to the law the presumption, in cases *not* involving the carrier's *fraud*, that shippers knew the carrier's tariffs. Nor should anyone's eyes be closed to the fact that the reason for the action of the courts was to prevent collusion and consequent undercutting of the Act, *not* to encourage fraud by a carrier against a shipper.

It is not necessary to tell this Court that the basic purpose of the Act was to lessen the stranglehold which railroads and favored shippers—many of whom were thus able to grow into monopolies—had upon large segments of the American economy.[6] To this end, the courts fashioned the presumption of knowledge by the shippers of a carrier's rates in order to counteract the likelihood of secret refunds under the guise of claims of the carrier's misquotation of rates. For even after the passage of the Act, attempts at secret and collusive rebating did not come to a halt[7] and the courts kept sharp eyes out for any practice by which a favored shipper might be able to achieve an advantage over his business competitor by securing, through collusion with the carrier, a rate lower than the filed rate the competitor was required to pay[8] and thus defeating one of the primary purposes of the Act.

The only place in the Interstate Commerce Act where a "conclusive presumption" was created *by Congress* was

---

[6]Report of the Senate Select Committee on Interstate Commerce, 49th Congress, 1st Session, 1886, Pgs. 191, 198 & 199; First Annual Report of the Interstate Commerce Commission, 1887, Pgs. 5-7; "Railroad Transportation", Hadley, A.T., Pg. 21 (G.P. Putnam's Sons, 1885, 1889 Ed.); "The Interstate Commerce Act", Drinker, Henry S., Pg. 55 (George T. Bisel Co., 1909).

[7]*New York, New Haven and Hartford R.R. Co. v. Interstate Commerce Commission*, 200 U.S. 361 (1906); *Armour Packing Company v. United States*, 209 U.S. 55 (1908); *Standard Oil Co. of Indiana v. United States*, 164 F. 376 (7th Cir. 1908); *New York Central and Hudson River Railroad Company v. United States*, 212 U.S. 481 (1909); *United States v. New York Central and Hudson River Railroad* 212 U.S. 509 (1909).

[8]This factor is not present in the case at Bar, since the lower rate offered by the carrier other than Consolidated was open to all, including any competitor of Terry Tuck's.

in the Elkins Act 49 U.S.C.A. 41(2), which provided that "in any prosecution begun under section 41, 42 or 43" of the Act, the rate filed by the carrier shall *"as against such carrier, its officers or agents"* [emphasis supplied] "be conclusively deemed to be the proper rate."

Prosecutions under those sections could be brought against shippers, as well as against carriers. At the time of the adoption of the Elkins Act in 1903, no decision of *this Court* had established any rule of a presumption of knowledge by the shipper of the carrier's rates, let alone a conclusive presumption. Had Congress intended to impose such a presumption upon the shipper, it could have done so at the time it imposed that presumption on the carrier, but it clearly was not minded to do so.

In 1906, this Court for the first time adopted the position that "whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress [the Interstate Commerce Act], for the amount fixed by the published schedule of rates and charges, and this lien can be discharged . . . only by the payment of such amount.[9] This, the Court held, was so "whether or not" the shipper "knew that the rate he obtained was less than the scheduled rate."[10]

It may be noted that the Court there did not speak of any "presumption" and certainly not of any "conclusive presumption." It simply asserted the rule that the published rate was paramount. Of course, it cannot be doubted that this court felt at that time, with other courts and with the Interstate Commerce Commission, that "[t]o permit shippers to impute negligence to carriers in quoting rates and on that ground to enjoy the rate quoted instead of paying

---

[9]*Texas & Pacific Rwy. Co. v. Mugg & Dryden*, 202 U.S. 242, 245 (1906).
[10]*Id.*

the lawfully published rate would open a broad and ample way for the payment of rebates and for other unlawful practices and might, in its practical results, work a repeal of the essential feature of this legislation"[11] and that "collusion between the carrier and a shipper, which it desired to favor . . . would be rendered too easy of accomplishment."[12]

It was the *joint action* of carrier and favored shipper to negate the Act's prohibition of rebating which was the potential evil perceived by both the Interstate Commerce Commission and the courts. For despite the passage of the Interstate Commerce Act and the Elkins Act (1903) and the Hepburn Act (1906), powerful shippers and railroads were still attempting to evade the prohibition of rebates to favored shippers.[13] It was, however, as we have noted, not until 1913 that the magic words "conclusively presumed" appeared in a decision of this Court in a civil case involving a misquotation of a rate.[14]

Two years later when this Court, in *Louisville & N.R. Co. v. Maxwell*, 237 U.S. 94 (1915), a case which, unlike the case at Bar involved no fraud, no wilful misrepresentation, quoted from *Carl* with approval, it pointed out that the rule "embodies the policy which has been adopted by Congress in the regulation of interstate commerce *in order to prevent unjust discrimination*." *Id.* at 97. (Emphasis supplied.)

---

[11]*Poor v. Chicago B.& Q. R. Co.*, 12 Inters. Com. Rep. 418, 423-424 (1907).
[12]*Forster Bros. Co. v. Duluth S.S.& A.R. Co.*, 14 Inters. Com. Rep. 232, 236 (1908).
[13]Note 7, *supra*.
[14]*Kansas City Rwy. Co. v. Carl*, *supra*, pg. 5, 227 U.S. 639, 653.

This Court Has Held That the Policy of the Act Is Not Contravened by Permitting the Shipper to Offset His Damage From a Carrier's Wrong Against the Carrier's Claim for Its Charge.

This Court has not found that to permit a shipper to recover for a *carrier's wrong* would result in unjust discrimination or, in any way, interfere with or vitiate the purposes of the Interstate Commerce Act. Indeed, *this Court* has found the very opposite to be true and has had no hesitation about permitting the shipper to seek relief by way of set-off or counterclaim when wronged by the carrier.

The alleged problem of the possibility of collusion between shipper and carrier for rebates, etc., did not impress this Court in *Chicago & N.W. Rwy. v. Lindell*, 281 U.S. 14 (1930). There this Court recognized that while the shipper was liable for the full amount of the carrier's tariff rate, the shipper was nevertheless entitled to set-off, or to recover, by way of counterclaim, the damages suffered as a result of the carrier's negligence.

The only difference between *Lindell* and the case at Bar is the imposition *by the Court below* of a "conclusive presumption" in a situation where *this court* has made clear that that doctrine did not apply, namely, in the case of "fraudulent acts".[15] There is, of course, no basis in reason, in logic and indeed, in law, as this Court has recognized, for fastening upon an innocent party who has been subjected to a carrier's fraud in regard to its rates such a court-made "conclusive presumption" when this Court has refused to permit any such presumption to interfere with, let alone preclude, recovery for a carrier's simple negligence.

---

[15]*George N. Pierce v. Wells Fargo, supra*, 236 U.S. 278, 286 (1915).

The only possible argument that could be made for the imposition upon a defrauded party of such a rule which, on its face and in its application, is unjust to the party defrauded, is that to permit recovery by the injured party might open the door to evasion of the Act and to the evils the Act was designed to eliminate. But this Court in *Lindell* saw that that presented no problem and almost summarily dismissed that argument.[16] The question which had been certified to the Court was whether a "shipper acting in good faith and without collusion" was debarred by 49 U.S.C.A. §41 from pleading "by way of set-off, a counterclaim for a loss suffered by him as a result of the carriers failure to perform its obligations touching the transportation and delivery *of the identical shipment*." [Emphasis supplied.] (281 U.S. 14.)

The Court pointed out that "The purpose of the Act to prevent discrimination has been emphasized by this Court and is well known."[17] The Court then met head-on the issue of possible collusion between carrier and shipper and consequent discrimination and said, "It is well understood that payment by carriers to shippers under the guise of settling claims for loss and damages may in effect constitute discrimination that the act was intended to prevent," and obviously, on the basis that that would not be the result of permitting such offset or counterclaim by the shipper, the Court proceeded to answer the certified question "No."[18]

---

[16]It is of interest—and perhaps, also, of significance—that the opinion of the unanimous court was written by Mr. Justice Butler, who, before taking his seat on the Court, had been one of the country's leading railroad lawyers. (Proceedings in Memory of Honorable Pierce Butler 308 U.S. v (1939).)

Why permitting a counterclaim for damages due to fraud in a carrier's rate quotation would have any different effect from permitting a counterclaim for damages due to a carrier's negligence, cannot be explained in any manner, except by digging in one's heels and proclaiming loudly "conclusive presumption, conclusive presumption"—something which this Court had noted was not applicable in case of the carrier's fraud. In *Lindell* this Court specifically recognized the possibility of collusion and fraud between shipper and carrier, "under the guise of" settling actions brought by one or the other, but clearly took the position that by 1930 that possibility was much too remote or too negligible to deny to a shipper aggrieved by a carrier the right to recover his damages. Certainly nothing has intervened since that time to increase that remote possibility.

The Third Circuit Court of Appeals recognized this clear aspect of this Court's decision when, in *Southern Pacific Company v. Miller Abattoir Company*, 454 F.2d 357, 360 (3rd. Cir. 1972) (a case in which damages for breach of a shipping contract was pleaded as a set-off against the freight charges) it said:

> "The Railroad argues that, even if its failure were a breach of the shipping contract, to allow recovery of damages for the breach would offend 49 U.S.C.A. §6(7). That is, an unscrupulous railroad could purposely neglect to give the immediate notice called for by the contract and thus give a disguised rebate to the customer so favored . . . *This argument was rejected by the Supreme Court, however, in Chicago & N.W. Rwy. v. Lindell*, 281 U.S. 14 (1930)."[19] [Emphasis supplied.]

---

[19]454 F.2d 357, 360.

The Court then quoted from this Court's opinion, and stated:

> "The language quoted leaves little doubt that the Court understood the danger of disguised rebates, but rejected it as a reason for denying recovery to the injured shipper . . . It would not be the fact of paying damages, but the overpayment of damages, that would constitute unlawful 'rebate'. The fact that a railroad might seek to evade laws forbidding rebates through such a subterfuge is not sufficient to warrant denial of damages to those customers of railroads who suffer through some breach of duty by the railroad."[20]

These words, just as the words of this Court in *Lindell* are equally applicable—indeed, more so—to the situation where a carrier actually practices fraud upon a shipper. There simply is no basis for permitting a court-made "conclusive presumption"—and in a far different context when uttered by this Court—to give blessing and reward to a carrier's fraud.

Not many weeks ago, this Court pointed with approval to Mr. Justice Black's admonition in his dissenting opinion in *Francis v. Southern Pacific Co.*, 333 U.S. 445, 471 (1948), "When precedent and precedent alone is all the argument that can be made to support a court fashioned rule, it is time for the rule's creator to destroy it."[21]

It was precedent and precedent alone rather than logic or public interest or necessity which impelled the holding of the Court below (and of the Seventh and Eighth Circuits) and which, unless this Court speaks, will be the basis for

---

[20]454 F.2d 357, 360-361.

[21]*Trammel v. United States*, 48 U.S. L.W., 4201, 4203. (February 27, 1980).

similar holdings when like cases, involving a carrier's fraud, arise.

To be sure, this Court was not the creator of the rule that the "conclusive presumption" of knowledge of the rate applied against a shipper in case of a carrier's fraud in connection with the rate. That fact, however, should not stay this Court's hand in destroying the rule before it is further misapplied as it has been by the Court below, as well as by the Seventh and Eighth Circuits.

Perhaps in addition to what this Court said in *Trammel* and what Mr. Justice Black had said in *Francis*, it may be illuminating to note what Professor Hillman[22] said in quoting the words of another member of this Court:

> "In seeking to lift the heavy hand of precedent from another field of law, Justice Cardozo, in preachment amply justified by his steadfast practice, once urged that 'a spirit of realism should bring about a harmony between present rules and present needs.'[23] His admonition is no less compelling when applied to a field of economic regulation having its origins in the political context and economic policies of another era."

---

[22]"Competition and Railroad Price Discrimination", Hillman, J.J., pg. 148 (The Transportation Center of Northwestern University, 1967).

[23]The Nature of the Judicial Process, in Selected Writing of Benjamin Nathan Cardozo, 174 (Hall ed. 1947).

Conclusion.

We urge that certiorari be granted so that this Court may consider whether the "conclusive presumption" doctrine fashioned to avert fraud should be used to insulate a carrier from liability for wilful fraud perpetrated by a carrier on a shipper.

Respectfully submitted,

SLAFF, MOSK & RUDMAN,
GEORGE SLAFF,
MARC R. STEIN,
Attorneys for Petitioner
Terry Tuck, Inc.

April 18, 1980.

APPENDIX A.

Memorandum and Order Re: Findings of Fact, Conclusions of Law, Granting Partial Summary Judgment, Dismissing Counterclaim, Dismissing Claim for Punitive Damages, and Dismissing Action.

United States District Court, Central District of California. Consolidated Freightways Corporation of Delaware, a corporation, Plaintiff, v. Terry Tuck, Inc., a corporation, Defendant.

Terry Truck, Inc., a corporation, Cross-Complainant, v. Consolidated Freightways Corporation of Delaware, a corporation, Cross-Defendant. Civil No. 75-1911-HP.

Filed: Nov. 6, 1975.

On October 20, 1975, the above-entitled matter came on for hearing upon plaintiff's motions for partial summary judgment and dismissal of defendant's counterclaim. The court having read the affidavits, moving papers and points and authorities submitted by the parties, and being fully advised in the premises now makes the following findings of fact, conclusions of law, and rulings:

I. PARTIAL SUMMARY JUDGMENT

Findings of Fact

1. Plaintiff Consolidated Freightways Corporation of Delaware [hereafter "Consolidated"] is a common carrier by motor vehicle authorized by the Interstate Commerce Commission to operate in interstate commerce.

2. It is stipulated by the parties that Consolidated is a corporation authorized to do business in California.

3. Terry Tuck, Inc. is a corporation organized under the laws of the State of California and is authorized to do business in this state.

4. As pertinent to this action, Consolidated is authorized to carry general commodities between Lawrence, Massachusetts and Los Angeles, California.

5. Between September 24, 1974 and November 27, 1974, Malden Mills, Inc. of Lawrence, Massachusetts, tendered to Consolidated twenty-four (24) shipments of a commodity denominated by the said Malden Mills, Inc. as "pile fabric NOI," destined for and delivered to the defendant at Los Angeles, California.

6. The aforesaid pile fabric NOI was shipped suspended in boxes on rolls or creels.

7. At the times of the various shipments, pile fabric NOI shipped suspended in boxes was classified in the National Motor Freight Classification Tariff 100-A, Item 49540 sub 1 as "Class 200 AQ" freight.

8. The aforesaid National Motor Freight Classification Tariff 100-A is published on behalf of Consolidated and filed with the Interstate Commerce Commission.

9. At the times of the various shipments, Class 200 AQ freight moving between Lawrence, Massachusetts and Los Angeles, California carried a rate of $41.70 per hundred weight, pursuant to Rocky Mountain Motor Tariff Bureau 521, Section 8, eleventh and twelfth revised pages 308; Rocky Mountain Motor Tariff Bureau Tariff 21-C, first revised page 306; Rocky Mountain Motor Tariff Bureau Tariff 521, fourth revised title page; Rocky Mountain Motor Tariff Bureau Tariff 120, fifteenth revised page 167; Rocky Mountain Motor Tariff Bureau Tariff 20-G, second revised page 296; and Increase Supplements 40 and 41 to Rocky Mountain Motor Tariff Bureau Tariff 521, all of which tariffs are published on behalf of Consolidated and are on file with the Interstate Commerce Commission.

10. The aggregate amount payable under the applicable tariffs for the transportation services rendered by Consolidated is $20,816.44.

11. Certain payments have been made by the defendant for the transportation services rendered by Consolidated aggregating $8,873.67.

12. The balance due for the transportation services rendered by Consolidated is $11,942.77, which sum has not been paid by the defendant.

Conclusions of Law

1. This action arises under an Act of Congress regulating commerce, namely, 49 U.S.C.A. § 317(b). This court has original jurisdiction of this cause pursuant to 28 U.S.C.A. § 1337.

2. The only lawful rate which may be charged and received by a common carrier operating in interstate commerce is the rate published in the carrier's tariffs on file with the Interstate Commerce Commission. *New York Cent. & H.R.R. Co. v. York & Whitney*, 256 U.S. 406 (1921).

3. The shipper or consignee of property shipped in interstate commerce is liable as a matter of law for the difference between the freight charges erroneously claimed by the carrier and the larger amount due under the applicable tariffs. *New York Cent. & H. R.R. Co., supra.*

4. The carrier must, under compulsion of law, recover undercharges regardless of contrary agreement or misquotation by the carrier. *Louisville & N. R. Co. v. Maxwell*, 237 U.S. 94, 59 L. Ed. 853 (1915); *Locust Cartage Co. v. Transamerican Freight*, 430 F. 2d 334, 343 (1st Cir. 1970).

5. The only lawful rate which the plaintiff is permitted to charge for the transportation of pile fabric NOI suspended in boxes, between Lawrence, Massachusetts and Los An-

geles, California, is $41.70 per hundred weight. *New York Cent. & H. R. R. Co., supra.*

6. The defendant, having paid a lesser rate than $41.70 per hundred weight for the transportation pf pile fabric NOI suspended in boxes, is liable as a matter of law for the difference between the lesser amount, and the full tariff charge. *New York Cent. & H. R. R. Co., supra.*

7. The defendant is liable for freight charges in the amount of $11,942.77.

8. There being no genuine issue as to any material fact, and the defendant being liable as a matter of law for the carrier's lawful charges, the motion for partial summary judgment is granted.

II. MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM

It further appearing to the court that:

1. The shipper is without remedy against the carrier for alleged damage due to reliance upon incorrect freight charges, *Pettibone, etc., Trustees of Indianapolis and Louisville Ry. Co. v. Richardson,* 126 F. 2d 969 (7th Cir. 1942);

2. Defendant's counterclaim is based on alleged damages suffered from defendant's reliance upon Consolidated's incorrect freight charge quotation;

3. Defendant's counterclaim fails to state a cause of action; therefore, Consolidated's motion to dismiss is granted. F. R. Civ. P. 12(b) (6).

III. CONSOLIDATED'S CLAIM FOR PUNITIVE DAMAGES

Moreover, the court finds that:

1. Consolidated has asked for punitive damages due to alleged conscious misrepresentation by defendant of the nature of the freight shipped by means of Consolidated's transportation service;

2. Plaintiff Consolidated basically presents a contract action for which punitive damages do not ordinarily lie, Cal. Civ. Code § 3294 (West 1970);

3. The damages suffered by plaintiff are a result of improperly low freight payments made by defendant and are hereby remedied by the grant of partial summary judgment;

4. Plaintiff's claim for punitive damages is dismissed upon the court's own motion because such damages are not appropriate for the claim presented in this action.

Accordingly,

IT IS ORDERED that:

1. Consolidated's motion for partial summary judgment is granted;

2. Consolidated's motion to dismiss the counterclaim is granted;

3. Consolidated's claim for punitive damages is dismissed;

4. The cause having been determined by motions for partial summary judgment and dismissal for failure to state a cause of action, this action is now dismissed;

5. Each side to bear its own costs;

6. The Clerk of the Court shall serve copies of this Order, by United States mail, upon the parties appearing in this cause.

Dated: November 6, 1975.

/s/ Harry Pregerson
Harry Pregerson

APPENDIX B.

Opinion.

United States Court of Appeals, for the Ninth Circuit. Consolidated Freightways Corporation of Delaware, a corporation, Plaintiff-Appellee, v. Terry Tuck, Inc., a corporation, Defendant-Appellant.

Terry Tuck, Inc., a corporation, Cross-Complainant-Appellant, v. Consolidated Freightways Corporation of Delaware, a corporation, Cross-Defendant. C. A. No. 77-2119.

Filed: Jan. 28, 1980.

Appeal from the United States District Court for the Southern District of California.

Before: Kennedy and Farris, Circuit Judges, and Thompson,* District Judge.

PER CURIAM:

Under the Motor Carriers Act § 217(b), 49 U.S.C. § 317(b) (1976), Consolidated Freightways sued Terry Tuck for an amount still owing under the applicable ICC-approved tariff. Terry Tuck counterclaimed for fraud, alleging that the carrier knowingly misquoted the shipping rates. The district court granted Consolidated's summary judgment motion for the amount still due, and it dismissed the counterclaim pursuant to Fed. R. Civ. P. 12(b) (6). The facts are admittedly indistinguishable from those occurring in *Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979), *Pettibone v. Richardson*, 126 F.2d 969 (7th Cir. 1942), and *F. Burkhart Mfg. Co. v. Fort Worth & D.C. Ry. Co.*, 149 F.2d 909 (8th Cir. 1945). We agree with the Seventh and Eight Circuits that no claim for relief can be predicated on a carrier's alleged fraudulent misquotation of tariffs. Accordingly, the district court's judgment and order are AFFIRMED.

---

*The Honorable Gordon Thompson, Jr., United States District Judge, Southern District of California, sitting by designation.

Supreme Court, U. S.
FILED
MAY 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
79-1693

TERRY TUCK, INC.,

Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

GARFIELD, TEPPER & ASHWORTH,
SCOTT J. TEPPER,
CHRISTOPHER ASHWORTH,
A Professional Corporation,
2029 Century Park East,
Suite 500,
Los Angeles, Calif. 90067,
(213) 277-1981,
Attorneys for Respondent Consolidated Freightways Corporation of Delaware.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Argument	3
The Question Presented by Petitioner Does Not Merit Review on Writ of Certiorari	3
A Claim Against an Interstate Carrier for Purportedly Fraudulent Misquotation of Rates May Not Be Stated No Matter How Artfully It Is Pleaded	4
From a Practical Standpoint, the Relief Sought by the Petitioner Would Inevitably Lead to Massive Rebating and Discriminatory Practices	5
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases — Page

Aero Trucking Inc. v. Regal Tube Co., 594 F.2d 619 (7th Cir. 1979) 5

Atchison T. & S.F. Ry. Co. v. Bonziden, 307 F.2d 230 (10th Cir. 1962) 5

Atchison T. & S.F. Ry. Co. v. Robinson, 233 U.S. 173 (1914) 3

F. Burkhart Manufacturing Co. v. Fort Worth & D.C. Ry. Co., 149 F.2d 909 (8th Cir. 1945) 5

George N. Pierce Co. v. Wells Fargo & Co., 236 U.S. 278 (1915) 3

Great Northern R. Co. v. O'Connor, 232 U.S. 508 (1914) 3

Gulf, Colorado & S.F. Ry. Co. v. Hefley and Lewis, 158 U.S. 98 (1895) 5

Illinois Central R.R. Co. v. Henderson, 226 U.S. 441 (1913) 5

Louisville & N.R. Co. v. Maxwell, 237 U.S. 94 (1915) 5

Pettibone v. Richardson, 126 F.2d 969 (7th Cir. 1942) 5

R.E. Sharp, Inc. v. Miller Hay Company, 261 Cal.App.2d 81, 67 Cal.Rptr. 854 (1968) 6, 7

Silent SiouxCorporation v. Chicago & N.W. Ry. Co., 262 F.2d 474 (8th Cir. 1959) 5

Texas & Pac. Ry. Co. v. Mugg, 202 U.S. 242 (1906) 5

Rules

Rules of the Supreme Court of the United States, Rule 19 ..... 3, 4, 5

Rules of the Supreme Court of the United States, Rule 19.1(b) 3

Statutes

United States Code, Title 38, Sec. 1254(1) 1

United States Code, Title 49, Sec. 317(b) 4

IN THE

Supreme Court of the United States

October Term, 1979

79-1693

TERRY TUCK, INC.

Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

Opinions Below.

The opinions of the District Court for the Central District of California and the Court of Appeals for the Ninth Circuit are set out in Appendices A and B, respectively, in the Petition of petitioner herein. The opinion of the Court of Appeals is reported at 612 F.2d 465.

The judgment of the District Court was entered on November 7, 1975.

The judgment of the Court of Appeals was entered on January 29, 1980.

Jurisdiction.

The jurisdiction of the Court is invoked by petitioner pursuant to 28 U.S.C. §1254(1).

Question Presented.

The question presented by the Petitioner for review may be stated as follows:

1. May a claim for fraud against a common carrier operating in interstate commerce be stated by alleging that the carrier misquoted rates in order to retain the business of a shipper?

ARGUMENT.

The Question Presented by Petitioner Does Not Merit Review on Writ of Certiorari.

While this Court's Rule 19 is not an exhaustive statement of the Court's discretion, it does posit the generally recognized criterion for review upon a writ of certiorari, namely, that review will "be granted only where there are special and important reasons therefor." The constituent elements of "special and important" are set forth in summary form in Rule 19.1(b). Adverting to that subsection, we note first of all that the petitioner concedes in the footnote at page 3 of its petition that there is no conflict among the circuits with respect to the fact that a claim of "fraud" may not be asserted against an interstate carrier premised upon a misquotation of the carrier's filed tariff rate.[1] Nor, of course, does this case involve "an important state or territorial question" in a way that will conflict with state or territorial law.

Petitioner suggests that the Ninth Circuit has decided a federal question which conflicts with applicable decisions of this Court. In support of that position, petitioner immediately misstates the holdings in the three cases upon which it relies: *Great Northern R. Co. v. O'Connor*, 232 U.S. 508 (1914); *Atchison T. & S.F. Ry. Co. v. Robinson*, 233 U.S. 173 (1914); and *George N. Pierce Co. v. Wells Fargo & Co.*, 236 U.S. 278 (1915). Each of those cases stands for the proposition that a *shipper* may not defraud a carrier by first stating a lesser valuation of his goods (and thereby receiving a lower freight charge) and then later, upon loss or injury to the goods, claiming that it is entitled to damages based on a higher or unlimited valuation. Pe-

---

[1]The Seventh, Eighth, Ninth and Tenth Circuits are in accord.

titioner's suggestions that these cases stand for something else is simply wrong.[2]

A Claim Against an Interstate Carrier for Purportedly Fraudulent Misquotation of Rates May Not Be Stated No Matter How Artfully It Is Pleaded.

The "issue" which is the linchpin of decisions in cases of this kind is the well-settled proposition that the public policy of the United States requires that a common carrier operating in interstate commerce not deviate from its published rates, but instead offer equal rates and accommodations to all. Although the applicable statutory materials are set forth correctly in the petitioner's brief, they are worth repeating here:

> No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith . . . than the rates, fares and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit *in any manner or by any device* directly or indirectly, or through any agent or broker, or otherwise, any portion of the rates, fares or charges so specified . . . .

49 U.S.C. §317(b) [Emphasis added]. Thus, it has been uniformly held (whether or not stated as a product of a "conclusive presumption") that (1) carriers operating in interstate commerce have an affirmative legal duty to recover their full tariff charges, and (2) no defense or counterclaim is available to the shipper because of the carrier's negligent or willful misquotation or misstatement of its tariff

---

[2]Respondent defers to the next section its discussion of the last possible criterion for review pursuant to Rule 19, *i.e.*, petitioner's claim that the law has not been "settled" by this Court.

charges. See *Texas & Pac. Ry. Co. v. Mugg*, 202 U.S. 242 (1906); *Illinois Central R.R. Co. v. Henderson*, 226 U.S. 441 (1913); *Louisville & N.R. Co. v. Maxwell*, 237 U.S. 94 (1915); *Aero Trucking Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979); *Pettibone v. Richardson*, 126 F.2d 969 (7th Cir. 1942); *F. Burkhart Manufacturing Co. v. Fort Worth & D.C. Ry. Co.*, 149 F.2d 909 (8th Cir. 1945); *Silent Sioux Corporation v. Chicago & N.W. Ry. Co.*, 262 F.2d 474 (8th Cir. 1959); *Atchison T. & S.F. Ry. Co. v. Bonziden*, 307 F.2d 230 (10th Cir. 1962).

Additionally, this Court has held that no action will lie for a misquotation of rates even when there is a specific state statute which creates a cause of action for such misquotation. *Gulf, Colorado & S.F. Ry. Co. v. Hefley and Lewis*, 158 U.S. 98 (1895).

Respondent notes here that the cases cited next above also put to rest the last basis for granting certiorari stated in Rule 19, *i.e.*, petitioner's suggestion that the law has not been "settled" by this Court. The issue, properly framed, has been settled by this Court and by the courts of every jurisdiction where rate uniformity is required by statute for the better part of a century.

From a Practical Standpoint, the Relief Sought by the Petitioner Would Inevitably Lead to Massive Rebating and Discriminatory Practices.

If granted, the relief petitioner seeks might well result in an interstate carrier recovering less than its full tariff charges. If a claim could be stated by alleging that a carrier has fraudulently misquoted its rates to a shipper's detriment, carriers could favor certain shippers and indirectly rebate to them by simply misquoting their rates and enduring an artfully pleaded lawsuit to the effect that the shipper had been "defrauded." The shipper would then be able to re-

cover damages (or be entitled to a set off) equal to the difference between the improperly quoted rate on the one hand and the actual filed rate on the other hand. The result, of course, would be massive rebating.

It is precisely this kind of transparent artifice that the Interstate Commerce Act prohibits. It is a practical result which every jurisdiction, federal and state, has legislated against since the turn of the century. One California case that brings the foregoing sharply into focus is *R.E. Tharp, Inc. v. Miller Hay Company*, 261 Cal.App.2d 81, 67 Cal.Rptr. 854 (1968):

> We do not here deal with ordinary circumstances. On the contrary, the recovery of undercharges by a carrier through the judicial process is founded on salutary public policy and is not only a right but a duty. In fact, it has been repeatedly held that the recovery of undercharges is one of the most effective means of preserving the minimum rate structure and of eliminating collusion between carriers and shippers. [Citations omitted] As the court said in *Transmix Corp. v. Southern Pacific Co.* [citation omitted]:
>
> > " . . . the reason why there must be inflexibility in the enforcement of the published rate against all and every suggestion for relaxation rests upon the practical impossibility otherwise of maintaining equality between all shippers without preferential privileges of any sort. The rate when published becomes established by law. It can be varied only by law, and not by the act of the parties."

Moreover, it is common knowledge that carriers are less than enthusiastic in their pursuit of litigation to recover undercharges from their customers. Therefore, in the absence of careful judicial supervision, inept

> pleadings could be used as a clever device to thwart the orders of the Public Utilities Commission and to contravene the legislative scheme which is designed to protect the public interest in a vital quasi-public industry.

261 Cal.App.2d at 85-86.

Conclusion.

Petitioner has failed to show a proper ground for granting certiorari. The only practical result of giving the petitioner the relief it seeks, if certiorari were granted, would be to recreate the anachronistic evils which the Interstate Commerce Act sought to abolish: *i.e.*, secret rebating and unequal treatment of shippers.

The petition should be denied.

Dated: May, 1980

Respectfully submitted,

GARFIELD, TEPPER, & ASHWORTH,
SCOTT J. TEPPER,
CHRISTOPHER ASHWORTH,
A Professional Corporation,
Attorneys for Respondent Consolidated Freightways Corporation of Delaware.

Supreme Court, U. S.
FILED
MAY 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1693

TERRY TUCK, INC.,

Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Respondent.

REPLY BRIEF OF TERRY TUCK, INC.

SLAFF, MOSK & RUDMAN,
GEORGE SLAFF,
MARC R. STEIN,
9200 Sunset Boulevard,
Suite 825,
Los Angeles, Calif. 90069,
(213) 275-5351,
Attorneys for Petitioner,
Terry Tuck, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF AUTHORITIES CITED

Cases	Page
Atchison, T & S.F. Ry. Co. v. Robinson, 233 U.S. 173 (1914) 1,	2
Chicago & N.W. Rwy. v. Lindell, 281 U.S. 14 (1930)	3
George N. Pierce Co. v. Wells Fargo & Co., 236 U.S. 278 (1915) 1,	2
Great Northern R. Co. v. O'Connor, 232 U.S. 508 (1914) 1,	2
R.E. Tharp, Inc. v. Miller Company, 261 Cal.App.2d 81, 67 Cal.Rptr. 854 (1968)	3
Southern Pacific Company v. Miller Abbatoir Company, 454 F.2d 357 (3rd Cir. 1972)	3

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1693

TERRY TUCK, INC.,

Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Respondent.

PETITIONER'S REPLY BRIEF.

Respondent states that, in support of our statement that the Ninth Circuit has decided a federal question which conflicts with applicable decisions of this Court "petitioner immediately misstates the holdings in the three cases upon which it relies: *Great Northern R. Co. v. O'Connor*, 232 U.S. 508 (1914); *Atchison, T. & S.F. Ry. Co. v. Robinson*, 233 U.S. 173 (1914); and *George N. Pierce Co. v. Wells Fargo & Co.*, 236 U.S. 278 (1915)."

Nothing could be further from the fact. Our petition very accurately stated that the *O'Connor* case was "Like *Carl* . . . a case in which the shipper had shipped goods at a rate which provided for a lower valuation than the goods' actual value and when the goods were lost, sought to recover their actual value." (Pet. Br. pg. 6.)

Actually, it is respondent which has completely misconceived the thrust of those three cases in which this Court

took pains to point out a clear distinction as to conclusiveness of the filed rates where *fraud of the carrier* was involved.

It is obvious that the filed rate is conclusive where neither shipper nor carrier has committed a fraud.

It is obvious that the filed rate is conclusive where the shipper has committed (or attempted to commit) a fraud upon the carrier.

It should be equally obvious that if, as respondent suggests, this Court had been concerned in those three cases *with the shipper's fraud* or attempted fraud, there obviously would have been no need to point to the circumstances where the filed rate was *not* conclusive. Thus, unless this Court's statements were aimed directly *at the carriers* there would have been no purpose whatever in the Court specifically stating that the filed rates were *not* conclusive when there was "something to show rebating or false billing"[1] or "an attempt at rebating or false billing"[2] and finally, that the conclusiveness of the filed rates had "no application to fraudulent acts or false billings."[3]

It is significant that while the first two of those cases spoke of "rebating or false billing", the third, *Pierce*, went even further and spoke more broadly of "*fraudulent acts*", as to which the doctrine of conclusiveness of the filed rates had no application.

It was to the carriers that the Court was issuing the warning that when they engaged in "fraudulent acts", they could not cloak themselves in the immunity (conclusive presumption) of their filed rates.

---

[1]*Great Northern R. Co. v. O'Connor, supra.*
[2]*Atchison, T. & S.F. Ry. Co. v. Robinson, supra.*
[3]*George N. Pierce Co. v. Wells Fargo & Co., supra.*

Petitioner's second point that "From a Practical Standpoint, the Relief Sought by the Petitioner Would Inevitably Lead to Massive Rebating and Discriminatory Practices" not only has nothing to support it, either in the record or in any fact of common knowledge of which this Court could take cognizance but, as we pointed out in our Petition,[4] was squarely disposed of by this Court in *Chicago & N.W. Rwy. v. Lindell*, 281 U.S. 14 (1930), a case which respondent, understandably, ignores completely—as it also similarly ignores *Southern Pacific Company v. Miller Abbattoir Company*, 454 F.2d 357 (3rd Cir. 1972).

We add only one short note—the statement in Respondent's Brief, at page 6, from *R.E. Tharp Inc. v. Miller Company*, 261 Cal.App.2d 81, 67 Cal.Rptr. 854 (1968) (a case, incidentally, which was decided on a matter of pleading rather than substance) that "it is common knowledge that carriers are less than enthusiastic in their pursuit of litigation to recover undercharges from their customers" is belied by respondent's own actions.

Respondent's enthusiasm for pursuit of such litigation was so great that its corporate counsel was able to write in a letter to petitioner's attorneys, "Evidently you feel that our Mr. Armstrong misled Terry Tuck about the freight rates. As you undoubtedly are aware, *whatever misrepresentations* Mr. Armstrong may have made do not affect your client's liability for freight charges . . . . Therefore, the *relevant question is not whether Mr. Armstrong is telling the truth* but whether we charged Terry Tuck the proper tariff.[5] " [Our emphasis.]

Respondent has sued for and collected the charges embodied in its "proper tariff".

---

[4]Petition, pgs. 13-14
[5]R. 180-181

The only question here is whether petitioner is to be denied an opportunity to prove its damages resulting from respondent's Mr. Armstrong's fraudulent misrepresentations and to recover them when proven after it has been determined, among other things, by a Court, not by counsel, whether or not Mr. Armstrong's truth-telling or lack of it is relevant and by a jury, not by counsel, whether in fact Mr. Armstrong is, or was, telling the truth.

May 27, 1980.

Respectfully submitted,

SLAFF, MOSK & RUDMAN,

GEORGE SLAFF,

MARC R. STEIN,

Attorneys for Petitioner,
Terry Tuck, Inc.